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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-742

R. D. TIMPANY, Trustee in Reorganization of the Property of the Central Railroad Company of New Jersey,

Petitioner,

v.

STATE OF NEW JERSEY, COMMONWEALTH OF PENNSYLVANIA and PENNSYLVANIA PUBLIC UTILITIES COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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STATE OF NEW JERSEY, COMMONWEALTH OF PENNSYLVANIA and PENNSYLVANIA PUBLIC UTILITIES COMMISSION,

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Counter-Statement of the Questions Presented

1. Does a reorganization court have the power under § 77 of the Bankruptcy Act to authorize a railroad in reorganization to discontinue rail services without first seeking the approval of the appropriate state regulatory agency or the Interstate Commerce Commission?

2. Is this case distinguishable from *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939)?

Counter-Statement of the Case

On March 22, 1967 the Central Railroad of New Jersey (hereinafter referred to as the "CNJ") filed a petition for reorganization with the United States District Court for the District of New Jersey under § 77 of the Bankruptcy Act (11 U.S.C. § 205).

After the present trustee assumed office in 1971, a plan for the reorganization of the CNJ, known as the "Blueprint for Survival", was proposed. The plan contemplated the cessation of CNJ's operations in Pennsylvania, but the continuation of services, including passenger operations, within New Jersey.

On Auugst 9, 1971, a plan of reorganization predicated on the successful implementation of the Blueprint for Survival was filed with the Interstate Commerce Commission. This plan is still pending before the I.C.C.

The CNJ has now abandoned its operation in Pennsylvania but continues to operate vital freight and passenger services within New Jersey. The passenger services consist of three separate lines, two of which bring commuters into the City of Newark. There are approximately 25,000 to 30,000 riders who use these passenger services daily.

On November 22, 1972 the trustee in bankruptcy, without having made prior application either to the appropriate state regulatory agency or to the I.C.C., filed an application with the reorganization court for authority to discontinue all passenger operations of the CNJ (Third Circuit Appendix, at 6a to 43a). The petition was brought on for hearing before the reorganization court only ten business days after service of the petition upon the State (Third Circuit Appendix, at 1a, 146a).

At the conclusion of the hearing, the court rendered an oral opinion granting the trustee's application for authority to discontinue all passenger service (App. 3a to 10a). This ruling was embodied in Order No. 547 (App. 1a to 2a).

The State of New Jersey and the Commonwealth of Pennsylvania filed separate notices of appeal from this order to the Third Circuit Court of Appeals, which affirmed in a short *per curiam* opinion (App. 20a to 22a). The State and Commonwealth then filed petitions for rehearing *in banc*, which were granted (App. 23a to 24a), and the matter was reargued before the court *in banc* on May 23, 1973.* The Court of Appeals reversed Order No. 547 in an opinion holding that the reorganization court lacked the power to enter an order permitting the discontinuance of passenger service on the CNJ without complying with the requirements of federal and state law:

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* The statements in the Petition for Writ of Certiorari to the effect that the trustee was not afforded an adequate opportunity to present his case to the court *in banc* are difficult to understand. Although the court did not request the filing of an answer before granting the petition for rehearing *in banc*, *Rules* 35 and 40 of the Federal Rules of Appellate Procedure do not require such a procedure. In this case, the court probably concluded that there was no need to ask for an answer, because the arguments set forth in the State's petition for rehearing were nearly identical to those in its briefs on the merits. Furthermore, the court *in banc* heard oral argument before deciding the case. Finally, it is reasonable to assume that if the experienced counsel retained by the trustee had concluded, either after the petition for rehearing was granted or after the oral argument before the court *in banc*, that he had been deprived of an adequate opportunity to present his case, he would have sought leave to file a supplemental brief. Since he failed to do this, it is fair to assume that he was satisfied at the time with the presentation of his case.

> "[T]his Court holds that termination of passenger service cannot be ordered by the district court supervising the reorganization of a railroad under section 77, unless such termination has been approved by the appropriate agency." (App. 41a).

The court further noted that its holding

> ". . . does not preclude district courts from permitting ailing railroads to terminate services. Rather, it holds only that the reorganization court require railroads seeking termination to follow certain procedures. Adherence to such procedures is not an exercise in formalism. Rather, such adherence reflects two important concerns. First, application to the appropriate state agency preserves the balance between federal and state powers in this field. Second, administrative review assures that an agency with substantial expertise, be that agency state or federal, will provide that the appropriate amalgam of public concern for rail transport and private rights of property is achieved." (App. 42a).

The trustee then filed a petition for further rehearing *in banc*, raising for the first time the arguments now primarily relied upon in the Petition for Writ of Certiorari. This petition was denied by the Third Circuit (App. 6a to 70a).*

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* In late October, 1973, the trustee for the CNJ entered into a passenger subsidy contract with the New Jersey Commuter Operating Agency, subject to the approval of the reorganization court, for the period from July 1, 1973 to June 30, 1974. The contract, which provides for an annual subsidy of $7.9 million, contains no cancellation clause.

ARGUMENT

There is no basis for the Court to grant a Writ of Certiorari, because the Court of Appeals correctly determined that this case is squarely controlled by *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939) and later cases which hold that a railroad reorganization court lacks the authority under § 77 of the Bankruptcy Act to circumvent the procedures established by Congress and state legislatures with respect to the cessation of rail services.

The reorganization court authorized the trustee of the CNJ to discontinue all of its passenger operations within the State of New Jersey without seeking the permission of either any state regulatory agency or the I.C.C.*

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* In the State of New Jersey, if a passenger subsidy contract is in effect, an application for any change in service must be made to the Commuter Operating Agency in the Department of Transportation. N.J.S.A. 27:1A-24. If the expenditure of public funds is not involved, an application must be made to the Board of Public Utility Commissioners. N.J.S.A. 48:2-24.

If a rail line operates from a point in one state to a point in another state, then the railroad may disregard the requirements of state law and apply directly to the I.C.C. for permission to discontinue the service pursuant to 49 U.S.C. § 13a(1). If a discontinuance of service rises to the level of an "abandonment" within the meaning of § 77(o) of the Bankruptcy Act (11 U.S.C. § 205(o)) and § 1(18) of the Interstate Commerce Act (49 U.S.C. § 1(18)), the application also may be made directly to the I.C.C. *Colorado* v. *United States*, 271 U.S. 153 (1926). If the service operates entirely within a single state, then the railroad may petition the I.C.C. for permission to discontinue the service only after the state agency has denied such relief pursuant to 49 U.S.C. § 13a(2).

Although there has been some controversy as to which of these procedures would be applicable, what *Palmer* holds is that the reorganization court lacks the authority to override the applicable administrative procedure, regardless of which one is applicable.

In so doing, as the Court of Appeals properly held, it exceeded the powers of a reorganization court under § 77 of the Bankruptcy Act as construed in *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939).

In *Palmer*, the Old Colony Railroad in Massachusetts had suffered nearly $6 million in losses in a two-year period. This was attributable solely to losses in passenger service, since the freight continued to make money. The railroad therefore applied to the State Public Utility Commission for permission to discontinue certain passenger trains. When the Commission failed to issue a final decision within six months, the railroad petitioned the reorganization court for permission to discontinue those services. The reorganization court granted this relief, concluding that the failure to allow discontinuance "would result in confiscation." On appeal, the Court of Appeals reversed this discontinuance order on the grounds that it was in excess of the reorganization court's authority. *Converse* v. *Massachusetts*, 101 F. 2d 48 (2nd Cir. 1939). On appeal this Court affirmed in an opinion which squarely held that a reorganization court lacks the power to authorize the discontinuance of rail service without complying with the requirement of applicable state and federal laws:

> "In view of the judicial history of railroad receiverships and the extent to which § 77 made judicial action dependent on approval by the Interstate Commerce Commission, it would violate the traditional respect of Congress for local interests and for the administrative process to imply power in a single judge to disregard state law over local activities of a carrier the governance of which Congress has withheld even from the Interstate Commerce Commission, except as part of a com-

> plete plan of reorganization for an insolvent road." *Palmer* v. *Massachusetts,* 308 U. S. at 88.

Subsequent to *Palmer,* in cases involving matters within the jurisdiction of the I.C.C., the Court has reaffirmed its holding that Congress did not confer power on a railroad reorganization court to preempt the jurisdiction of state and federal regulatory agencies with respect to the cessation of rail service. *Smith* v. *Hoboken Railroad, Warehouse and Steamship Connecting Co.,* 328 U. S. 123 (1946); *Thompson* v. *Texas Mexican R. Co.,* 328 U. S. 134 (1946). See also *New Haven Inclusion Cases,* 399 U. S. 392 (1970). These later cases have emphasized that Congress intended the I.C.C. to play the central role in railroad reorganizations in order to preserve the nation's rail transportation system. In the *New Haven Inclusion Cases, supra,* the Court said:

> "Central to the statutory objective that the reorganized company should, if at all possible, emerge as a 'living, not a dying * * * enterprise', . . . is the understanding that 'a railroad [is] not like an ordinary insolvent estate.' *Palmer* v. *Massachusetts,* 308 U. S., at 86. . . . To the traditional equity jurisdiction of the bankruptcy court, § 77 adds the oversight of the Interstate Commerce Commission, the agency 'specially charged with the public interest represented by the transportation system.' *Ibid.* The statute contemplates that '[t]he judicial functions of the bankruptcy court and the administrative functions of the Commission [will] work cooperatively in reorganizations.' *Warren* v. *Palmer,* 310 U. S. 132, 138 . . .
>
> "In structuring the cooperative endeavor of agency and court, Congress 'placed in the hands of

> the Commission the primary responsibility for the development of a suitable plan' for the debtor railroad." 399 U. S. at 431.

Thus, it is the I.C.C., not the reorganization court, which has been given the primary responsibility to determine which rail services must be continued as part of a plan of reorganization. If the I.C.C. refuses for any reason to approve a plan of reorganization, including an inability to find that the plan "will be compatible with the public interest," a reorganization court may dismiss the reorganization proceedings. 11 U.S.C. § 205(e), (g). See *In re New York, New Haven and Hartford Railroad Co.*, 289 F. Supp. 451, 459 (D. Conn. 1968); *In re Wyoming Ry. Co.*, 94 F. Supp. 371 (D. Wyo. 1950). However, the holding of *Palmer* is that a trustee may not simply by-pass statutorily prescribed procedures and ask the reorganization court to take over the functions of the I.C.C. and state regulatory agencies.

The grounds on which the petitioner attempts to distinguish *Palmer* from this case are lacking in substance.

The assertion that *Palmer* is inapplicable because the State consented to the reorganization court hearing this matter is without support in the record. The alleged statement of the Commissioner of Transportation* by

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* The sole testimony relied upon for this claim is the following statement by the trustee:

> "These discussions continued until mid September. And in mid September Commissioner Kohl, as I understood him, suggested that I should go to court. And when I did go to court on the Wednesday before Thanksgiving, I tried to call him. I couldn't reach him and I sent him a letter, saying: In view of what you said before, I have taken this action." (Third Circuit Appendix, at 146a).

which the State is claimed to have consented to the proceedings amounted to nothing more than the familiar, "if you don't like our offer, take us to court," which often punctuates the unsuccessful termination of negotiations. Furthermore, the petitioner never advanced the contention that a waiver of any objection to the jurisdiction of the reorganization court should be implied from the Commissioner's alleged remark either before the reorganization court or in the Court of Appeals, except in his petition for further rehearing, which was filed *after* the Court of Appeals had rendered its final decision. This not only indicates that the notion the State had waived its objections to the jurisdiction of the reorganization court was an afterthought of appellate counsel, but also, under well established principles governing review by this Court, should preclude the petitioner from now raising the point. *Neely* v. *Eby Construction Co.*, 386 U. S. 317, 330 (1967).

The assertion that the State is barred from objecting to the lack of jurisdiction of the reorganization court because the attorney handling the matter failed to raise the point early enough is similarly lacking in substance. It is important to note in this connection that the motion for discontinuance was served upon the State the Wednesday before Thanksgiving, only ten business days before it was brought on for hearing (Third Circuit Appendix, at 1a, 146a). The motion contained no indication of any statutory authority for the reorganization court to grant the relief requested. Furthermore, the only brief submitted on behalf of the trustee was not served upon the State until after the hearing on the petition had begun (Third Circuit Appendix, at 65a). This procedural blitzkrieg not only stands in striking contrast to the careful and deliberate consideration accorded

passenger discontinuance applications by the I.C.C. and New Jersey regulatory agencies, but also in fairness should preclude the trustee from claiming that the citizens of New Jersey may be denied the protection of the procedures established by Congress and the New Jersey Legislature for the cessation of passenger services simply because the attorney handling the matter was not able to fully research the law before the hearing. Moreover, this contention too was raised for the first time in the petition for further rehearing *in banc* and thus the petitioner should be barred from now raising the point. *Neely* v. *Eby Construction Co., supra.*

In any event, *Palmer* clearly holds that a railroad reorganization court lacks the power under § 77 of the Bankruptcy Act to permit the discontinuance of passenger services, without the trustee first complying with the applicable requirements of state and federal laws. It is well established that a challenge to the authority of a court to entertain jurisdiction over a matter may be raised at any time. *Gutierrez* v. *Waterman Steamship Corp.*, 373 U. S. 206 (1963); *McGrath* v. *Christianson*, 340 U. S. 162 (1950). Therefore, even if it could be fairly said, notwithstanding the circumstances described above, that the State failed to object in a timely fashion to the lack of authority of the reorganization court to permit a discontinuance of passenger service on the CNJ, this would not preclude raising the point on appeal.

Lastly, the petitioner suggests that *Palmer* is not controlling because the discontinuance order here was based on a finding, absent in *Palmer*, that there had been an unconstitutional taking of the debtor's property. In fact, exactly the opposite is true; whereas the reorganization court in *Palmer* expressly found that "failure to grant

the relief asked would result in confiscation," *Converse* v. *Massachusetts, supra,* 101 F. 2d at 50, the findings of the CNJ reorganization court on this question were, at best, equivocal. In any event, the holding in *Palmer,* reaffirmed by the Court of Appeals opinion herein,* is that the reorganization court lacks the power to entertain an application for the discontinuance of rail service even if it is based on allegations of an unconstitutional taking.

One probable reason for the congressional decision not to confer this power upon reorganization courts was its awareness that the mere fact that a railroad has been losing money, even for a lengthy period of time, does not necessarily mean that the continuation of its operations will result in an unconstitutional taking of property. *Cf. Fort Smith Light & Traction Co.* v. *Bourland,* 267 U. S. 330 (1925). The efforts of the state and federal agencies may produce a plan by which management efficiencies, reduction in labor costs, merger with another railroad, or the discontinuance of certain selected serv-

* The first point of the petition seeks to elevate a single sentence observation at the conclusion of the Third Circuit opinion, relating to the findings of the lower court as to the existence of an unconstitutional taking, into the holding of the court, thereby obscuring the conclusion that *Palmer* is controlling. The observation was made as a postscript to the main part of the opinion to show that the findings of the court below did not provide a proper foundation for the legal arguments advanced by the petitioner. The opinion does not state that a railroad reorganization court, which is a statutory court, could acquire additional powers beyond those conferred upon it by § 77 of the Bankruptcy Act if such findings had been made, but only that there was no question before it as to the constitutionality of § 77 as construed in *Palmer.*

ices,* may enable a railroad which has long been operating at a loss to resume profitable operations.** The complexity of the analysis which must be undertaken before it can be said that the continuation of rail services will amount to an unconstitutional taking of property was well stated by Judge Anderson in his opinion in *In re New York, New Haven and Hartford Railroad Company, supra*:

> "The extent to which the constitutional minimum of value of property rights to which the bondholders are entitled . . . may properly be invaded in the public interest to keep railroad operations going pending a solution of the problem of reorganization, is hardly a matter which can be determined with mathematical precision. It involves a consideration of the amount and nature of the Railroad's obligations, the seriousness of adverse consequences to the public if service were terminated, the rate of losses and the feasibility of possible solutions." 289 F. Supp. at 459.

In declining to grant reorganization courts the power to allow discontinuances of rail service, Congress no doubt acted in full realization of the complexity of the consid-

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* In fact, after the original decision of the Third Circuit in this matter, the trustee filed a petition with the New Jersey Commuter Operating Agency for authority to discontinue passenger service on the smallest of the CNJ's three lines, contending that that particular line operates at a heavy loss and is not required by public convenience or necessity.

** It is interesting to note in this connection that whereas the CNJ's income and expense statements for the first eight months of 1972 indicated net losses of $6,760,047., the net losses for the first eight months of this year have been $1,560,322., which is only one-fourth of what the losses were a year ago.

erations that come into play in making such a determination and the consequent desirability of allowing agencies with expertise in the field to be given the first opportunity to review an application for such relief.

It is impossible to quarrel with the petitioner's observation that "[t]he railroads in the northeast are in crisis." (Petition for Writ of Certiorari, p. 11). However, the solution to this crisis does not lie in the precipitous termination of vital rail services which provide transportation for commuters into the nation's major urban centers. Rather, every effort must be made, either through greater efficiency in management, appropriate reductions in the work force and the discontinuance of unnecessary services by means of consolidation and merger or through the enactment of comprehensive new legislation such as is now under consideration in Congress, to preserve the vital rail services now being performed by these railroads. The primary responsibility for protecting the public interest in rail service has been vested by existing legislation in the I.C.C. and state regulatory agencies, and Congress has withheld power from reorganization courts to circumvent these procedures. This was the square holding of *Palmer* v. *Massachusetts* and there is therefore no unsettled question of federal law posed by the petition which would warrant plenary review by the Court.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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